

1 THE HONORABLE BENJAMIN H. SETTLE  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 TODD BRINKMEYER

11 Petitioner,

12 v.

13 WASHINGTON STATE LIQUOR AND  
14 CANNABIS BOARD,

15 Respondent.

16 Case No. 3:20-cv-05661-BHS

17 **PETITIONER'S MOTION FOR  
18 SUMMARY JUDGMENT**

19 **NOTE ON MOTION CALENDAR:  
20 MARCH 11, 2022**

21 **ORAL ARGUMENT REQUESTED**

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## I. INTRODUCTION AND RELIEF REQUESTED

A defining purpose of the Constitution was to set the terms of fair play amongst the states and their citizens. The founders abhorred individual states' protectionist policies, which hindered the union and limited opportunities for residents of other states. The founders addressed their concerns by enumerating several rights in the Constitution that prevent economic discrimination. In contravention of those provisions and fundamental principles of national unity, Washington reserves its multi-billion dollar legalized cannabis market to its own long-term residents, preventing any recent Washington resident and all nonresidents from owning a licensed cannabis business. This type of blatant economic protectionism has always been unconstitutional.

Todd Brinkmeyer comes to this Court seeking equal treatment by the State of Washington when it processes his application to obtain an interest in a licensed cannabis business. Brinkmeyer wishes to directly invest in and become an owner of the business his longtime friend Scott Atkison founded. With Brinkmeyer’s financial and business help, Atkison has built a successful cannabis business. Atkison is also a Stage IV cancer survivor and wants to make arrangements that ensure continuity of his business in the event his illness progresses, which includes selling his equity to Brinkmeyer. Brinkmeyer is familiar with Atkison’s business because the Washington Liquor and Cannabis Board (the “LCB” or “State”) has thrice approved Brinkmeyer to act as a financier for Atkison’s stores—an approval that involved subjecting Brinkmeyer to rigorous criminal and financial background checks, which he passed. Although the LCB allowed Brinkmeyer to loan Atkison’s business money, the LCB confirmed it will not allow Brinkmeyer to hold equity in that business. In making their decision, the LCB did not cite anything nefarious or even of concern with Brinkmeyer; the sole determinative factor was Brinkmeyer’s status as an Idaho resident.

The State's discriminatory policy of favoring its long-term residents facially violates numerous constitutional provisions—the Commerce Clause, the Privileges and Immunities Clause, and each of the Equal Protection, Privileges or Immunities, and Due Process Clauses of

1 the Fourteenth Amendment. Throughout this dispute, the State has not cited a single case  
 2 upholding a durational residency requirement in commerce, but Brinkmeyer has cited dozens  
 3 that uniformly struck residency requirements as unconstitutional, including those in the cannabis  
 4 field. Brinkmeyer asks this Court to continue that hundred year old unbroken chain of case law  
 5 and decide as a matter of law that the residency requirements violate the Constitution.

## 6 II. EVIDENCE RELIED UPON

7 This motion relies upon the Declaration of Andy Murphy in Support of Petitioner's  
 8 Motion for Summary Judgment ("Murphy Decl."), the Declaration of Chris Masse in Support of  
 9 Petitioner's Motion for Summary Judgment ("Masse Decl."), the Declaration of Todd  
 10 Brinkmeyer in Support of Petitioner's Motion for Summary Judgment ("Brinkmeyer Decl."), the  
 11 Declaration of Scott Atkison in Support of Petitioner's Motion for Summary Judgment ("Atkison  
 12 Decl."), and the Court's file.

## 13 III. FACTS

### 14 A. Washington Voters Approved Adult-Use Marijuana in 2012.

15 In 2012, the people of Washington approved Initiative Measure 502 ("I-502"), which  
 16 legalized the possession and sale of marijuana for adults. When codifying I-502, the legislature  
 17 affirmed the intent of the initiative "to stop treating adult marijuana use as a crime and try a new  
 18 approach that: (1) Allows law enforcement resources to be focused on violent and property  
 19 crimes; (2) Generates new state and local tax revenue for education, health care, research, and  
 20 substance abuse prevention; and (3) Takes marijuana out of the hands of illegal drug  
 21 organizations and brings it under a tightly regulated, state-licensed system similar to that for  
 22 controlling hard alcohol." I-502 §1.

23 The marijuana industry has been an economic powerhouse for the State of Washington.  
 24 The State has received more than \$1.7 billion in excise tax and fees generated from the sale of  
 25 marijuana since 2014. Murphy Decl. Ex. A ("Answer") ¶ 7. Public data indicates Washington's  
 26 marijuana industry has yielded more than \$13.8 billion in sales since 2014. Murphy Decl. Ex. B.

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1                   **B. The State Imposes a Durational Residency Requirement on All Licensees and True  
2 Parties of Interest to Marijuana Licenses.**

3                   The LCB tightly regulates the marijuana industry, and there are hundreds of rules that  
4 marijuana businesses must follow. *See generally*, ch. 69.50 RCW; ch. 314-55 WAC  
5 (collectively, the “LCB Rules”). The LCB Rules require owners of marijuana businesses to  
6 obtain licenses from the LCB. Answer ¶ 9. Those interested in becoming a licensee must apply,  
7 after which the LCB investigates the applicant to verify compliance with the LCB Rules. *Id.* ¶ 9

8                   In addition to verifying the applicant would not pose a threat to public health and safety if  
9 given a license, the LCB verifies that the applicant has resided in Washington for at least six  
10 months. *Id.* ¶ 10. That is because, by statute and regulation, Washington law imposes a  
11 durational residency requirement on those who apply for marijuana licenses. The statutory  
12 Residency Requirement, RCW 69.50.331(1)(b), provides the following:

13                   No license of any kind may be issued to:

14                   (i) A person under the age of twenty-one years;  
15                   (ii) A person doing business as a sole proprietor who has not lawfully resided in  
16                   the state for at least six months prior to applying to receive a license;  
17                   (iii) A partnership, employee cooperative, association, nonprofit corporation, or  
18                   corporation unless formed under the laws of this state, and unless all of the  
19                   members thereof are qualified to obtain a license as provided in this section; or  
20                   (iv) A person whose place of business is conducted by a manager or agent, unless  
21                   the manager or agent possesses the same qualifications required of the licensee.

22                   (Emphasis added.) This statutory “Residency Requirement” applies only to sole proprietorships  
23 and “members” of certain corporate entities, but the LCB expanded the Residency Requirements  
24 by administrative rule. WAC 314-55-020(11)<sup>1</sup> requires all marijuana license applicants to reside  
25 in Washington for “at least six months” before submitting their application to the LCB:

26                   Under RCW 69.50.331(1)(c) [sic], all applicants applying for a marijuana license  
27                   must have resided in the state of Washington for at least six months prior to  
28                   application for a marijuana license. All business entities including, but not limited  
29                   to, partnerships, employee cooperatives, associations, nonprofit corporations,  
30                   corporations and limited liability companies, applying for a marijuana license  
31                   must be formed in Washington. All members, governors, or agents of business

1 Brinkmeyer’s petition references WAC 314-55-020(10), but the LCB has since amended this regulation, so the challenged regulatory Residency Requirement is now in subsection 11.

1           entities must also meet the six month residency requirement. Managers or agents  
 2           who manage a licensee's place of business must also meet the six month  
 3           residency requirement.

4           (Emphasis added.) The LCB further expanded the Residency Requirements in WAC 314-55-035  
 5           by requiring all true parties of interest ("TPIs") to be applicants for a license. TPIs—which  
 6           include stockholders, members, managers, partners, officers, and those who exercise control over  
 7           a marijuana business—all must meet the residency requirement in WAC 314-55-020(11).  
 8           WAC 314-55-035(1). Only approved licensees and TPIs (and thus only long-term Washington  
 9           residents) may receive a share of the profits from a marijuana business operating in Washington.  
 10           WAC 314-55-035.

11           Moreover, through policy and practice, the LCB requires all applicants it approves as a  
 12           licensee or TPI to remain a Washington resident. *See Answer ¶ 15.* Licensees must forfeit their  
 13           license, their business, and any associated right to profit if they move out of Washington.

14           **C. The LCB Approved Brinkmeyer as a Financier for Marijuana Businesses, but will  
 15           not Allow him to Obtain an Equity Interest Solely Because he is an Idaho Resident.**

16           Brinkmeyer and Atkison have been close friends for more than 25 years. Brinkmeyer  
 17           Decl. ¶ 2; Atkison Decl. ¶ 2. Although they live just 30 minutes from each other, they reside in  
 18           different states. *Id.* Brinkmeyer lives in Idaho, and Atkison lives in Washington. *Id.*

19           Atkison is fortunate to have survived for over seven years with Stage IV cancer, however,  
 20           his illness has progressed to where it is prudent for him to plan the disposition of his estate.  
 21           Atkison Decl. ¶ 5. That includes planning to ensure continuity of operations at the marijuana  
 22           retail stores he partially owns in Washington (the "Stores"). *Id.* Atkison cares about the team  
 23           who have contributed to the Stores' success and does not wish to see his ownership sold under  
 24           duress, which could put undue stress on the Stores' other owners and business operations. *Id.* He  
 25           wants to make sure that he can transfer his ownership to someone who he trusts will do right by  
 26           the other owners, the Stores, and the team members. *Id.* The person Atkison believes to be best  
 27           suited for carrying on the same ownership values and principles he has brought to the Stores is

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1 Brinkmeyer. *Id.*

2 With the LCB's knowledge and approval, Brinkmeyer and Atkison already work together  
 3 on the Stores. Brinkmeyer has provided business advice to Atkison and loans to the Stores.  
 4 Brinkmeyer Decl. ¶ 4; Atkison Decl. ¶ 4. Indeed, the LCB approved Brinkmeyer three times as a  
 5 debt financier to the Stores. Answer ¶ 20. The LCB subjects financiers of licensed marijuana  
 6 businesses to the same vetting and approval process that it performs on licensees and TPIs,  
 7 including rigorous criminal and financial background checks, except debt financiers like  
 8 Brinkmeyer are not subject to the Residency Requirements. *See* Answer ¶¶ 19-22. Through its  
 9 three approvals of Brinkmeyer as a financier, the LCB has repeatedly concluded there is nothing  
 10 concerning in Brinkmeyer's background. *See id.*

11 As part of his estate planning, Atkison would like to transfer part of his ownership  
 12 interest in the Stores to Brinkmeyer, and will do so if the LCB will allow it. Atkison Decl. ¶ 5.  
 13 Brinkmeyer is willing and able to assume Atkison's interest. Brinkmeyer Decl. ¶ 6. To obtain  
 14 approval for the transfer of equity, counsel for Brinkmeyer inquired with the LCB about whether  
 15 it would approve him as an owner of the Stores. Masse Decl. Ex. A. On May 20, 2020, the LCB  
 16 confirmed it would deny Brinkmeyer's application to be added to the Stores' license because  
 17 Brinkmeyer does not comply with the Residency Requirements. *Id.*

18 Thus, while Brinkmeyer is able to support the Stores by providing debt financing, the  
 19 Residency Requirements prevent him from sharing in the profits of the Stores by providing  
 20 equity financing or becoming an owner solely because he is not a Washington resident. *See*  
 21 Answer ¶ 22. The LCB has evidently concluded it is safe for the Stores to take Brinkmeyer's  
 22 money, but against public policy for Brinkmeyer to become an owner of the businesses he  
 23 provides advice for and finances.

24 **D. Procedural History**

25 On June 8, 2020, Brinkmeyer filed this suit in Thurston County Superior Court for the  
 26 State of Washington. Dkt. ##1, 2. Brinkmeyer sought to invalidate the durational residency

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1 requirements for Washington’s licensed cannabis industry in RCW 69.50.331(1)(b)(ii)–(iv),  
 2 WAC 314-55-020(11), and WAC 314-55-035(1) (collectively, the “Residency Requirements”)  
 3 by alleging causes of action based on both Washington State and federal law. Dkt. #1. On July 7,  
 4 2020, the LCB removed the case to this Court based on federal question jurisdiction. Dkt. #1.

5 Brinkmeyer filed a motion for preliminary injunction in this Court on August 6, 2020.  
 6 Dkt. #6. After the parties fully briefed the preliminary injunction motion, but before the Court  
 7 ruled on the motion, the Court issued an order to show cause on September 8, 2020 seeking  
 8 briefing on whether this Court lacked jurisdiction. Dkt. #17. The parties responded and agreed  
 9 this Court had jurisdiction over Brinkmeyer’s claims and should rule on their merits. Dkt. ##18,  
 10 19. On October 5, 2020, the Court ruled it had jurisdiction over Brinkmeyer’s claims, but *sua*  
 11 *sponte* invoked *Pullman* abstention, then severed and remanded Brinkmeyer’s state law claims to  
 12 the Thurston County Superior Court. Dkt. #20 at 4, 6. The Court stayed Brinkmeyer’s federal  
 13 claims and this matter “pending final resolution of the state law claims.” *Id.* at 6–7.

14 On October 26, 2020, the Thurston County Superior Court re-instituted the state action  
 15 for a limited consideration of the state law issues. Dkt. #22. Brinkmeyer sought a preliminary  
 16 injunction in state court on December 30, 2020, which was denied on January 29, 2021. Murphy  
 17 Decl. Exs. C, D. The parties agreed to a summary judgment briefing schedule to accommodate  
 18 parental leave for the LCB’s counsel. *Id.* ¶ 5. Consistent with that briefing schedule, the parties  
 19 both sought summary judgment. *Id.* Exs. E, F. On July 23, 2021, the Thurston County Superior  
 20 Court dismissed with prejudice all of Brinkmeyer’s state law claims because the Washington  
 21 Constitution did not apply to him as a nonresident. *Id.* Ex. G at 2–3. On November 19, 2021, the  
 22 parties filed a stipulated motion to lift the stay, which the Court granted. Dkt. ##23, 25. The  
 23 parties, who agree this case should be resolved on cross motions for summary judgment, then  
 24 agreed on a briefing schedule for their summary judgment motions. Dkt. #30.

#### 25 **IV. AUTHORITY AND ARGUMENT**

26 This is a facial challenge to state laws that is ripe for resolution on summary judgment.

1 There are no disputes of material fact because the State admitted all relevant material facts in its  
 2 answer. Brinkmeyer is therefore entitled to summary judgment because the Residency  
 3 Requirements facially violate five independent provisions of the Constitution. Fed. R. Civ.  
 4 P. 56(a); *see, e.g.*, *Tennessee Wine & Spirits Ass'n v. Thomas*, 139 S. Ct. 2449, 2474–76 (2019)  
 5 (affirming grant of summary judgment finding residency requirements unconstitutional).

6 **A. The Admittedly Economic Protectionist Residency Requirements Violate the  
 7 Dormant Commerce Clause.**

8 The Residency Requirements violate the dormant Commerce Clause by preventing  
 9 nonresidents from obtaining equity investments in Washington's cannabis industry. *Tennessee*  
 10 *Wine*, 139 S. Ct. at 2464. Residency requirements that limit commercial opportunities have  
 11 always been unconstitutional regardless of the industry involved. For example, in striking a  
 12 South Dakota statute that prohibited corporations with nonresident shareholders from owning  
 13 gaming licenses, a federal district court recognized that preventing out-of-state investment  
 14 unconstitutionally burdens interstate commerce:

15 The gambling itself, however, is not the interstate commerce at issue in this case.  
 16 South Dakota is not regulating the individual gamblers who come to Deadwood to  
 17 try their luck at the slot machines. The interstate commerce allegedly affected by  
this statute, which prohibits certain types of business entities from obtaining a  
 18 license to operate gaming establishments in South Dakota, is the out-of-state  
investment in businesses holding South Dakota gaming licenses."

19 *Gulch Gaming, Inc. v. State of S.D.*, 781 F. Supp. 621, 625-26 (D. S.D. 1991) (emphasis added).

20 The constitutionality of residency requirements for ownership of licensed in-state  
 21 businesses was foreclosed in *Tennessee Wine* where the Court affirmed a summary judgment  
 22 ruling that invalidated a durational residency requirement to hold equity in Tennessee's licensed  
 23 alcohol industry. 139 S. Ct. at 2475. *Tennessee Wine* involved liquor licenses and this case  
 24 involves cannabis licenses, but that is a distinction without a difference particularly where states  
 25 have *more* authority to regulate liquor than cannabis due to the Twenty First Amendment. *See*  
 26 *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). In

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1 applying *Tennessee Wine*, numerous district courts have struck down residency requirements in  
 2 licensed cannabis markets for violating the dormant Commerce Clause.<sup>2</sup> See, e.g., *Ne. Patients*  
 3 *Grp. v. Maine Dep’t of Admin. & Fin. Servs.*, 1:20-CV-00468-NT, 2021 WL 3560840 (D. Me.  
 4 Aug. 11, 2021); *Toigo v. Dept. of Health and Senior Svcs.*, 2021 WL 5533412 (W.D. Mo. June  
 5 21, 2021); *Lowe v. City of Detroit*, 21-CV-10709, 2021 WL 2471476 (E.D. Mich. June 17,  
 6 2021); *NPG, LLC v. City of Portland*, 2:20-cv-00208-NT, 2020 WL 4741913 (D. Me. Aug. 14,  
 7 2020).

8 Under the dormant Commerce Clause, if a state law discriminates against nonresident  
 9 economic actors, “the law can be sustained only on a showing that it is narrowly tailored to  
 10 advance a legitimate local purpose.” *Tennessee Wine*, 139 S. Ct. at 2461 (internal quotation and  
 11 brackets omitted). States discriminate against interstate commerce by treating differently in-state  
 12 and out-of-state economic interests. *Conservation Force, Inc. v. Manning*, 301 F.3d 985, 995  
 13 (9th Cir. 2002). While the initial burden to show discrimination rests on Brinkmeyer, *Hughes v.*  
 14 *Oklahoma*, 441 U.S. 322, 336 (1979), he meets that burden because the Residency Requirements  
 15 expressly favor Washington residents over nonresidents. See *Tennessee Wine*, 139 S. Ct. at 2461;  
 16 *Oregon Waste Sys., Inc. v. Dept. of Environmental Quality of State of Oregon*, 511 U.S. 93, 98-  
 17 99 (1994) (“‘discrimination’ simply means differential treatment of in-state and out-of-state  
 18 economic interests that benefits the former and burdens the latter.”). The Residency  
 19 Requirements are thus subject to strict scrutiny review. *Conservation Force*, 301 F.3d at 995.

20 Under strict scrutiny review, the LCB must show a legitimate local purpose that cannot  
 21 be adequately served by reasonable nondiscriminatory alternatives. *Id.* at 997. Put another way,  
 22 the State must show that Residency Requirements are the “least discriminatory alternative” to  
 23 advance its legitimate purpose. *Id.*; see also *Hughes*, 441 U.S. at 336. This is no easy task. “State  
 24 laws discriminating against interstate commerce on their face are virtually *per se* invalid.”

25  
 26 <sup>2</sup> The dormant Commerce Clause violation is so facially apparent that when a lawsuit filed in federal court asserted  
 Maine’s residency requirement for marijuana businesses violated the dormant Commerce Clause, the State of Maine  
 declined to defend the residency requirement before a single motion was heard in the case. Murphy Decl. Ex. K.

1      *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 575 (1997) (internal  
 2      quotation omitted); *see also Granholm v. Heald*, 544 U.S. 460, 487 (2005) (“When a state statute  
 3      directly regulates or discriminates against interstate commerce, or when its effect is to favor in-  
 4      state economic interests over out-of-state interests, we have generally struck down the statute  
 5      without further inquiry.”). The State must show that its “justifications for discriminatory  
 6      restrictions on commerce pass the ‘strictest scrutiny.’ The State’s burden of justification is so  
 7      heavy that ‘facial discrimination by itself may be a fatal defect.’” *Oregon Waste*, 511 U.S. at 101  
 8      (citations omitted).

9                    **1. As a matter of law, none of the State’s purported interests provide a**  
 10                    **legitimate basis to uphold the Residency Requirements.**

11                  After admitting the primary justification of the Residency Requirements is economic  
 12                  protectionism, Answer ¶ 18, the State offered new justifications for its discriminatory statute and  
 13                  regulations: the Residency Requirements allegedly (1) meet the aims of the Cole Memo to have a  
 14                  “strong and effective regulatory scheme;” (2) allow the LCB to perform sufficient background  
 15                  checks on potential licensees, particularly misdemeanors; (3) allow local jurisdictions to provide  
 16                  information about potential licensees; (4) allow for enforcement and accountability of licensees;  
 17                  (5) “prevent big business from taking over the industry” or forming interstate business groups;  
 18                  (6) prevent illegal transactions and overproduction; and (7) respect other states’ decisions  
 19                  regarding legalization of cannabis (collectively, the “Justifications”). Dkt. #13-1 at 4-5; Murphy  
 20                  Decl. Ex. F (“LCB’s Resp. in State Court”) at 15-16, Ex. H (“Smith Decl.”) ¶¶ 5-20.

21                  None of the Justifications can save the Residency Requirements. The State did not  
 22                  account for the Supreme Court’s holding that residency requirements are unnecessary to  
 23                  maintain effective oversight when the licensed business will remain in state, and the state’s  
 24                  ability to revoke licenses provides sufficiently strong incentives to comply with the law.  
 25                  *Tennessee Wine*, 139 S. Ct. at 2475. The Justifications ultimately relate to preventing criminality,  
 26                  but the State’s existing enforcement abilities—including tracking all marijuana from seed-to-

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1 sale, requiring 24/7 security camera surveillance of marijuana facilities, and the right to access  
 2 and audit all business records of licensees—successfully prevent criminality from leeching into  
 3 the industry. WAC 314-55-083, -087, -185; Smith Decl. ¶ 14.

4 While the Justifications fail generally for these reasons, they fail individually too. First,  
 5 residency is unnecessary to comply with the Cole Memo. Numerous states have licensed  
 6 cannabis markets without residency requirements. Murphy Decl. Ex I. The Cole Memo focuses  
 7 on preventing diversion, and the State has not explained why owner residency is necessary when  
 8 diversion would originate in Washington where the businesses operate. Moreover, the Supreme  
 9 Court has already held that a state can maintain effective oversight of a licensed in-state business  
 10 if its owners live elsewhere. *Tennessee Wine*, 139 S. Ct. at 2464.

11 Second, the LCB claimed residency is necessary to investigate an applicant's  
 12 misdemeanor history. LCB's Resp. in State Court at 15-16. The State can require applicants to  
 13 provide their full criminal history, including misdemeanors in other states, and deny applications  
 14 if they provide inadequate information. WAC 314-55-050. If applicants lie in their application,  
 15 the resulting penalty is cancellation of the license. RCW 69.50.562(2)(b)(v). As a matter of law,  
 16 the LCB's ability to revoke licenses provides sufficient and strong incentives to comply with the  
 17 LCB's rules. *Tennessee Wine*, 139 S. Ct. at 2475; *see also Granholm*, 544 U.S. at 490 (“Out-of-  
 18 state wineries face the loss of state and federal licenses if they fail to comply with state law. This  
 19 provides strong incentives not to sell alcohol to minors.”); *see also Toigo*, 2021 WL 5533412, at  
 20 \*4 (rejecting the interest in getting criminal records from other states to support a residency  
 21 requirement in cannabis).

22 The State made the conclusory claim that financial vetting is more dynamic for owners  
 23 than financiers. Smith Decl. ¶ 11. But the State gave no reason why an applicant must be a  
 24 resident while the State reviews their financial records. Indeed, as a matter of law, the “State can  
 25 thoroughly investigate applicants without requiring them to reside in the State for [six months]  
 26 before obtaining a license.” *Tennessee Wine*, 139 S. Ct. at 2475.

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1       Third, the State claimed the objections local jurisdictions can make to applications are a  
 2 valuable source of information about the applicant’s character. Smith Decl. ¶¶ 8, 11. Residency  
 3 is not necessary to investigate an applicant’s character. *Tennessee Wine*, 139 S. Ct. at 2475. The  
 4 State also misstates the purpose of local input, which focuses on existing business operations, not  
 5 the applicant’s character. RCW 69.50.331(10). Regardless, whatever facts relate to the undefined  
 6 issues the Board purportedly values from local jurisdictions can be demanded from the applicant.

7       Fourth, the State claimed residency is needed for effective enforcement. Smith Decl. ¶¶ 6,  
 8 11. The Supreme Court disagrees. *Tennessee Wine*, 139 S. Ct. at 2475. A nonresident owner will  
 9 not change the location of the licensed business, which must be in Washington, and interviews or  
 10 responses to inquiries can be provided remotely. The State does not require that owners be  
 11 physically present in their facility or physically present to interact with enforcement officers.

12       Similarly, and contrary to *Tennessee Wine*, the LCB claimed the Residency Requirements  
 13 are necessary to hold licensees accountable in Washington courts. Smith Decl. ¶ 6; LCB’s Resp.  
 14 in State Court at 15. The State can hold nonresidents accountable by canceling their license. *See*  
 15 *Tennessee Wine*, 139 S. Ct. at 2475. Further, as a matter of law, the State’s objective can be  
 16 easily achieved “by ready alternatives, such as requiring a nonresident to designate an agent to  
 17 receive process or to consent to suit in the [Washington] courts.” *Id.* Notably, the State provided  
 18 no evidence that a nonresident applicant who passes the background check and receives a license  
 19 is more likely to engage in criminal conduct than a resident.

20       The State lamented it cannot enforce marijuana laws in other states. Smith Decl. ¶ 7. The  
 21 State has no need to. All licensed marijuana activity occurs in Washington and is reflected in  
 22 records that must be kept in Washington and accessible to the State upon request.

23       Fifth, the LCB claimed the Residency Requirements are necessary to prevent interstate  
 24 tied houses, but it provided no explanation for why this risk is greater for nonresidents than  
 25 current licensees who are already free to invest in out-of-state cannabis businesses. Nevertheless,  
 26 Washington law does not prohibit interstate tied houses, but only restricts financial interests

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1 among businesses licensed by the State. RCW 69.50.328; RCW 69.50.101(aa), (bb), (ee). This  
 2 Justification reveals the State's unlawful desire to regulate business conduct outside its borders.  
 3 *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). Similarly problematic is the State's claim  
 4 that residency is necessary to enforce its limit on holding no more than five retail licenses as  
 5 nonresidents may have retail stores in other states. Smith Decl. ¶ 10. Regardless, the State could  
 6 require applicants to disclose their interests in out-of-state marijuana businesses.

7 Sixth, the LCB claimed residency prevents diversion, but it has not produced any  
 8 evidence that is true. Instead, using Oregon as an example, the State claimed residency prevents  
 9 overproduction and thereby prevents diversion. Smith Decl. ¶ 14. The overproduction issues in  
 10 Oregon were not caused by the removal of its residency requirement, but because Oregon did not  
 11 cap the number of licenses it issued and had a low cost of market entry. Murphy Decl. Ex. J.  
 12 That concern does not apply to Washington, which has capped licenses and the volume of plants  
 13 businesses can grow since it created the market. *See id.* Ex I; WAC 314-55-075(6).

14 Moreover, while preventing diversion is important, “there are multiple nondiscriminatory  
 15 means of advancing that interest[.]” *Toigo*, 2021 WL 5533412, at \*5. For example, the *Toigo*  
 16 Court approved nondiscriminatory methods that the LCB already uses in Washington, such as  
 17 tracking marijuana from seed-to-sale, requiring constant video surveillance, giving the state a  
 18 broad right of access to cannabis businesses’ records, and conducting criminal background  
 19 checks on owners and financiers. *Id.*

20 “Furthermore, it is far from clear how a durational residency requirement actually hinders  
 21 the diversion of [] marijuana away from its intended purpose. It is no easier for a person who has  
 22 lived in [Washington] for less than [six months] to drive from [Washington to Montana] with []  
 23 marijuana in their trunk than it is for a person who has lived in [Washington] for [six months]  
 24 and a day.” *Id.* at \*5. “[I]t is no more difficult for a long-time [Washington] resident to smuggle  
 25 marijuana out of the [licensed] system and into the [unlicensed] market than it is for anyone  
 26 else.” *Id.*

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Last, the LCB argued the Residency Requirements respect the interests of Idaho, but provided no evidence of any issue Idaho has taken with Oregon or Nevada, which have no residency requirements for their cannabis industries. Murphy Decl., Ex I. There is no rational connection between the Residency Requirements and respect for other states. There is no evidence that Idaho or any other state has any legislative policy against owning a cannabis business outside of its jurisdiction, nor that any state has a legislative policy of denying its residents legal business opportunities in other jurisdictions. Nonetheless, employing the State’s reasoning, the Residency Requirements also show disrespect to those states that have legalized cannabis such as Oregon, Nevada, and California.

The State has not disputed that facially discriminatory laws are virtually *per se* invalid, but asserted the laws are narrowly tailored because the State previously imposed a three-month residency requirement. Dkt. #13-1 at 9. But the State must justify why a residency requirement of any duration is needed when its goals can be accomplished with less restrictive means. *Supra* at 8–9. *Tennessee Wine* already resolved that residency is unnecessary to maintain enforcement and oversight of in-state businesses. The State has and already employs the tools it needs to regulate cannabis businesses without discriminating against nonresidents. In other words, the State lacks a substantial reason for the Residency Requirements because they fail to achieve a legitimate interest beyond the interest already met by the State’s other non-discriminatory enforcement and oversight powers—none of which Brinkmeyer challenges or seeks to modify. The Residency Requirements thus violate the dormant Commerce Clause.

2. Federal courts agree that Residency Requirements violate the dormant Commerce Clause despite the federal illegality of cannabis.

The LCB has asserted the Residency Requirements are invulnerable to a dormant Commerce Clause challenge because the federal Controlled Substances Act (“CSA”) makes marijuana illegal. Dkt. #13-1 at 18. None of the federal courts that have ruled on residency requirements in cannabis agree. “Instead, in apparently all cases where federal courts have

1 confronted dormant Commerce Clause challenges to state or local laws that favor residents in the  
 2 recreational or medical marijuana context, the courts have held that such laws are likely  
 3 unconstitutional" for violating the dormant Commerce Clause. *Ne. Patients Grp.*, 2021 WL  
 4 3560840, at \*5 (citing *Toigo*, 2021 WL 5533412; *Lowe*, 2021 WL 2471476; *NPG*, 2020 WL  
 5 4741913)).

6 For example, in *NPG*, a nonresident challenged a system the City of Portland, Maine  
 7 developed to issue marijuana licenses, which gave preference to applicants who lived in the city.  
 8 *NPG*, 2020 WL 4741913, at \*2. The court rejected the defendant's argument that the CSA  
 9 enabled it to pass discriminatory laws in cannabis, ruled the City's law likely violated the  
 10 dormant Commerce Clause, and preliminarily enjoined its enforcement. *Id.* at \*12.

11 The *NPG* Court observed that "congressional action can alter the application of the  
 12 dormant Commerce Clause" and "Congress may use its powers under the Commerce Clause to  
 13 confer upon the States an ability to restrict the flow of interstate commerce that they would not  
 14 otherwise enjoy." *Id.* at \*9 (internal quotation and brackets omitted). The court described the  
 15 "high" standard to find Congress consented to allow burdens on interstate commerce:

16 [T]he state or local jurisdiction has the burden of demonstrating Congress's  
 17 "unmistakably clear intent to allow otherwise discriminatory regulations." *United*  
*Egg Producers v. Dep't of Agric. of P.R.*, 77 F.3d 567, 570 (1st Cir. 1996); *see also*  
*Maine v. Taylor*, 477 U.S. 131, 138-39 (1986) ("[B]ecause of the important role the  
 18 Commerce Clause plays in protecting the free flow of interstate trade, this Court  
 19 has exempted state statutes from the implied limitations of the Clause only when  
 20 the congressional direction to do so has been 'unmistakably clear.'"); *Tri-M Grp.,*  
*LLC v. Sharp*, 638 F.3d 406, 430-32 (3d Cir. 2011).

21 *Id.* In rejecting the same argument the State has made, the court found the CSA did not provide  
 22 "unmistakably clear intent" to burden interstate commerce. "[The CSA] nowhere says that states  
 23 may enact laws that give preference to in-state economic interests. In other words, although the  
 24 [CSA] criminalizes marijuana, it does not affirmatively grant states the power to burden  
 25 interstate commerce in a manner which would otherwise not be permissible." *Id.* at \*10 (internal  
 26 quotation omitted).

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1 Ignoring this ruling, the State has relied on *Gonzales v. Raich*, 545 U.S. 1, 22 (2005),  
 2 where the Court held Congress acted within its Commerce Clause power when passing the CSA  
 3 to restrict intrastate medical marijuana. Dkt. #13-1 at 18-19. *Raich* says nothing about allowing  
 4 states that legalize marijuana to restrict nonresident ownership. Further, Justice Thomas has  
 5 questioned whether the rationale of *Raich* applies today given the federal government's tacit  
 6 blessing of adult-use cannabis markets, including how Congress prohibits the Department of  
 7 Justice from spending funds to attack medical cannabis laws. *Standing Akimbo, LLC v. U.S.*, 141  
 8 S. Ct. 2236, 2237 (2021) ("Whatever the merits of *Raich* when it was decided, federal policies of  
 9 the past 16 years have greatly undermined its reasoning."); *see also Ne. Patients Grp.*, 2021 WL  
 10 3560840, at \*4 (observing that "Congress has barred the Department of Justice from using funds  
 11 'to prevent any [state] from implementing their own laws that authorize the use, distribution,  
 12 possession, or cultivation of medical marijuana[.]'"). "Suffice it to say, the Federal  
 13 Government's current approach to marijuana bears little resemblance to the watertight  
 14 nationwide prohibition that a closely divided Court found necessary to justify the Government's  
 15 blanket prohibition in *Raich*." *Standing Akimbo*, 141 S. Ct. at 2238. Thus, the State's reliance on  
 16 *Raich* or the formerly strict federal illegality of cannabis stands in stark contrast to recent  
 17 statements by the Court.

18 No federal court has found any language in the CSA that provides Congress's  
 19 "unmistakably clear intent" to allow states to pass economically discriminatory laws in cannabis  
 20 markets. One court, however, declined to reach the merits of a constitutional challenge to a  
 21 residency requirement in cannabis due to its federally illegal status. In *Original Investments, LLC*  
 22 *v. State*, CIV-20-820-F, 2021 WL 2295514 (W.D. Okla. June 4, 2021), the State of Oklahoma  
 23 challenged the authority of the court to issue a decision on the merits. The district court agreed  
 24 with one of the State's arguments and declined to exercise its jurisdiction because it would not  
 25 use its equitable powers to facilitate illegal conduct. *Id.* at \*2.

26 Those facts are remarkably different from this case. Unlike Oklahoma, the State agrees

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1     “[t]his Court should reach the merits of this case[.]” Dkt. #18 at 8. Unlike the *Original*  
 2     *Investments* Court, this Court has already ruled “it has jurisdiction to hear Brinkmeyer’s claims  
 3     despite the illegality of marijuana” under the CSA. Dkt. #20 at 4. And most importantly, because  
 4     Brinkmeyer asks only for fair treatment when the LCB processes his application, he does not ask  
 5     the Court to award any relief that is illegal under federal law. The State agrees. Dkt. #18 at 7  
 6     (“the nature of the relief asked from this Court is whether Washington’s residency requirement is  
 7     constitutional or not – the remedy requested does not necessitate a determination of whether  
 8     [Brinkmeyer] is entitled to be an owner in a marijuana business.”). Should the Court award  
 9     Brinkmeyer his requested relief, the result will be that the LCB assesses nonresident applicants  
 10    on their merits and character, not their address, if and when nonresidents submit applications.  
 11    That relief is constitutionally mandated, not illegal.

12           Brinkmeyer asks this Court not to join a minority of one and instead follow the prevailing  
 13    trend of federal courts by finding the CSA does not immunize the LCB from challenges to its  
 14    plainly discriminatory laws.

15   **B.     The Residency Requirements Violate the Privileges and Immunities Clause in  
 16       Article IV Because they Prevent Nonresidents from Doing Business in Washington.**

17           The Privileges and Immunities Clause of Article IV provides that the “Citizens of each  
 18    State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>3</sup> “The  
 19    primary purpose of the Privileges and Immunities Clause was to help fuse into one Nation  
 20    a collection of independent, sovereign States.” *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The  
 21    clause was “intended to create a national economic union,” *Supreme Court of New Hampshire v.*  
 22    *Piper*, 470 U.S. 274, 280 (1985), and was “designed to place the citizens of each State upon the  
 23    same footing with citizens of other States, so far as the advantages resulting from citizenship in  
 24    those States are concerned.” *Friedman*, 487 U.S. at 64 (1988) (internal quotation omitted). The

25  
 26           

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<sup>3</sup> “While the Privileges and Immunities Clause cites the term ‘Citizens,’ for analytic purposes citizenship and  
 residency are essentially interchangeable.” *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64 (1988).

1      Privileges and Immunities Clause of Article IV bars “discrimination against citizens of other  
 2      States where there is no substantial reason for the discrimination beyond the mere fact that they  
 3      are citizens of other States.” *Toomer*, 334 U.S. at 396.

4              Courts apply a two-step test to determine whether a residency requirement violates the  
 5      Privileges and Immunities Clause. *Barnard v. Thorstenn*, 489 U.S. 546, 552–53 (1989). First, the  
 6      court determines whether the alleged discrimination bears upon a fundamental right protected by  
 7      the Privileges and Immunities Clause. *United Bldg. & Constr. Trades Council v. Mayor of*  
 8      *Camden*, 465 U.S. 208, 218 (1984). Second, if the challenged law or regulation does deprive  
 9      nonresidents of a protected privilege or immunity, it is invalid unless “(i) there is a substantial  
 10     reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents  
 11     bears a substantial relationship to the State’s objective.” *Barnard*, 489 U.S. at 552–53 (internal  
 12     quotation and citation omitted). When determining whether there is a substantial relationship, the  
 13     court considers whether there are less restrictive means to achieve the same state objectives.  
 14     *Piper*, 470 U.S. at 284 n.17 (1985) (“the State may be required to achieve its legitimate goals  
 15     without unnecessarily discriminating against nonresidents”).

16              **1.      The Residency Requirements violate Brinkmeyer’s right to pursue a  
 17              livelihood and his right to travel.**

18              The Residency Requirements violate two privileges and immunities protected by Article  
 19      IV: the right to pursue a livelihood and the right to travel. It is firmly established that the  
 20      Privileges and Immunities Clause protects a nonresident’s right “to ply their trade, practice their  
 21      occupation, or pursue a common calling.” *Hicklin v. Orbeck*, 437 U.S. 518, 524-25 (1978) (citing  
 22      *Ward v. Maryland*, 79 U.S. 418 (1871)); *see also United Bldg.*, 465 U.S. at 219 (“[T]he pursuit  
 23      of a common calling is one of the most fundamental of those privileges protected by the  
 24      Clause... Many, if not most, of our cases expounding the Privileges and Immunities Clause have  
 25      dealt with this basic and essential activity.”). Because the Residency Requirements impose a six-  
 26      month waiting period before nonresidents can qualify for a marijuana license, and the LCB

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1 interprets these rules to require continuing residency of licensees, the Residency Requirements  
 2 infringe on the right to pursue a livelihood.<sup>4</sup> *Toomer*, 334 U.S. at 396 (“[I]t was long ago decided  
 3 that one of the privileges which the clause guarantees to citizens of State A is that of doing  
 4 business in State B on terms of substantial equality with the citizens of that State.”).

5 The right to travel is also a fundamental right protected, in part, by the Privileges and  
 6 Immunities Clauses in Article IV. *Saenz v. Roe*, 526 U.S. 489, 500–01 (1999). The right to  
 7 travel, as protected by Article IV, includes the right to be treated as a welcome visitor rather than  
 8 an unfriendly alien when temporarily present in a second state. *Id.* at 500. In protecting the right  
 9 to travel, the Supreme Court has struck residency requirements related to obtaining employment,  
 10 medical services, and licensing restrictions for commercial activity. *Id.* at 502 (citing cases).  
 11 Thus, the LCB’s outright ban on nonresidents obtaining a license for commercial activity in  
 12 Washington implicates the right to travel under the Privileges and Immunities Clause.

13 The State has argued Brinkmeyer’s Privileges and Immunities claim fails because there is  
 14 no right to sell an illegal substance. Dkt. #13-1 at 16. Brinkmeyer does not assert that right.  
 15 Instead, he relies on his fundamental rights to pursue a livelihood and travel. Those rights  
 16 independently guarantee that Brinkmeyer, as a nonresident, may compete commercially in  
 17 another state on the same footing as residents of that state. The Privileged and Immunities Clause  
 18 has always prohibited states from creating markets and then excluding nonresidents from those  
 19 markets. *See, e.g., Toomer*, 334 U.S. at 396. The State has cited no authority that would allow it  
 20 to escape that prohibition by creating a market that is, in some aspects, federally illegal.

21 In arguing against Brinkmeyer’s right to pursue a livelihood, the State has relied on  
 22 *Baldwin v. Fish & Game Comm’n of Montana*, 436 U.S. 371 (1978), which involved recreational  
 23 elk hunting. Dkt. #13-1 at 16-17. The *Baldwin* Court recognized that a license for recreational  
 24 hunting is different from a license for commercial activity, and the latter implicates the right to

25  
 26 <sup>4</sup> The Court interchangeably refers to the right to pursue a common calling and the right to pursue a livelihood. *See, e.g., Toomer*, 334 U.S. at 403 (using “common calling”); *Baldwin*, 436 U.S. at 386 (citing *Toomer* as support for how “a nonresident’s right to pursue a livelihood in a State other than his own” is protected by the Privileges and Immunities Clause.).

1 pursue a livelihood. 436 U.S. at 386. The license at issue here is not for recreational activity but a  
 2 commercial venture. The livelihood Brinkmeyer seeks to pursue in Washington is investment in  
 3 an industry the State created and improperly reserves to its own long-term residents. *Baldwin* is  
 4 more support for how the Residency Requirements violate the Privileges and Immunities Clause.

5 **2. The State cannot show a substantial reason supporting the Residency  
 6 Requirements because nonresidents are no more dangerous than residents.**

7 Because the Residency Requirements violate two of Brinkmeyer's rights protected by the  
 8 Privileges and Immunities Clause, they are invalid unless the State can show a substantial reason  
 9 for the discrimination against nonresidents that bears a substantial relationship to the State's  
 10 objective. *Barnard*, 489 U.S. at 552-53; *see, e.g.*, *Piper*, 470 U.S. at 284. A substantial reason for  
 11 discrimination does not exist "unless there is something to indicate that non-citizens constitute a  
 12 peculiar source of the evil at which the statute is aimed." *Reitz v. Kipper*, 674 F.Supp.2d 1194,  
 13 1201 (D. Nev. 2009) (quoting *Toomer*, 334 U.S. at 398). Thus, the State must prove that  
 14 nonresidents are somehow more "evil" than residents, its reasons for imposing the Residency  
 15 Requirements mitigate that evil, and there are not alternative less restrictive means to mitigate  
 16 that evil. *Piper*, 470 U.S. at 284 n.17. The State cannot, so the Residency Requirements violate  
 17 the Privileges and Immunities Clause.

18 To be sure, there is nothing inherently problematic about nonresidents, and the First  
 19 Circuit has cautioned against assuming residency disqualifies a person from receiving a  
 20 commercial license. In *Silver v. Garcia*, 760 F.2d 33 (1st Cir. 1985), the First Circuit struck a  
 21 residency requirement that Puerto Rico imposed on insurance professionals for violating the  
 22 Privileges and Immunities Clause. Puerto Rico attempted to justify its residency requirement by  
 23 claiming it was more difficult to investigate the trustworthiness and competence of nonresidents.  
 24 *Id.* at 38. The First Circuit recognized that "[t]here is no evidence that nonresidents are  
 25 inherently less trustworthy or less competent insurance professionals than Puerto Rican residents,  
 26 nor may we assume that this is so." *Id.* at 38; *see also Piper*, 470 U.S. at 285 (refusing to assume

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1 nonresident lawyers were less competent than resident lawyers). The same is true for business  
 2 owners in Washington, and the State has not identified why nonresidents are inherently more  
 3 problematic than residents when it comes to owning a share of a cannabis business.

4 The LCB has admitted that a primary purpose of the Residency Requirements is  
 5 economic protectionism for Washington residents. Answer ¶ 18. Economic protectionism is not a  
 6 legitimate aim of state policy. *Friedman*, 487 U.S. at 64 (1988). Further, the Justifications are not  
 7 substantial reasons under the Privileges and Immunities Clause for the same reasons they are not  
 8 legitimate local purposes under the dormant Commerce Clause analysis.

9       **3. The Residency Requirements bear no substantial relationship to legitimate  
 10       state objectives because less restrictive means are available and used.**

11       In addition to lacking a substantial reason for the Residency Requirements, the State  
 12 cannot establish its discrimination against nonresidents bears a substantial relationship to its  
 13 objectives. When evaluating the substantial relation element of the Privileges and Immunities  
 14 Clause, courts should consider whether less restrictive means of regulation are available.

15       *Barnard*, 489 U.S. at 552–53. For example, the *Barnard* Court struck a residency requirement  
 16 for lawyers barred in the Virgin Islands that was premised, in part, on how nonresidents would  
 17 be less likely to attend court proceedings on short notice compared to residents. *Id.* The Court  
 18 held that a less restrictive means to accomplish that objective would be requiring lawyers to  
 19 retain local attorneys to be available for unscheduled meetings and hearings. *Id.* at 554. As  
 20 addressed in the dormant Commerce Clause analysis and similar to *Tennessee Wine*, any  
 21 substantial reason found by the Court would be better addressed by the regulations governing all  
 22 cannabis licensees than through the Residency Requirements.

23       The State previously asserted the Residency Requirements bear a substantial relationship  
 24 to the Justifications because applicants returned to their home states when the residency  
 25 requirement was three months. Dkt. #13-1 at 17-18. That travel was constitutionally protected.  
 26 *See Saenz*, 526 U.S. at 500. Denying an application on that protected basis is an unconstitutional

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1 penalty, not a justification to restrict fundamental rights. *See Harman v. Forssenius*, 380 U.S.  
 2 528, 540 (1965). Further, the duration of the requirement is irrelevant when there are less  
 3 restrictive means to accomplish the State's objectives. *Barnard*, 489 U.S. at 552-53. As  
 4 described above, less restrictive means already exist due to the State's tight regulation. Thus, the  
 5 Residency Requirements violate the Privileges and Immunities Clause.

6 **C. The Residency Requirements Violate the Equal Protection and Privileges or  
 7 Immunities Clauses of the Fourteenth Amendment.**

8 The Residency Requirements violate the Equal Protection and Privileges or Immunities  
 9 Clauses of the Fourteenth Amendment for similar reasons. Durational residency requirements  
 10 have been challenged under both clauses, and the analysis is similar for both. *Compare Dunn v.*  
 11 *Blumstein*, 405 U.S. 330 (1972) (equal protection) *with Saenz*, 526 U.S. 489 (privileges or  
 12 immunities). Both clauses protect the right to travel, which provides "for those travelers who  
 13 elect to become permanent residents, the right to be treated like citizens of their new state of  
 14 residence." *Saenz*, 526 U.S. at 500. State law burdens the right to travel "when it actually deters  
 15 such travel, when impeding travel is its primary objective, or when it uses any classification  
 16 which serves to penalize the exercise of that right." *Soto-Lopez*, 476 U.S. at 903 (citations and  
 17 quotation marks omitted).

18 The Residency Requirements are constitutionally suspect for infringing on the  
 19 fundamental right to travel because they discriminate between newly arrived bona fide residents  
 20 and those residing in the state for over six months; thus, they are subject to strict scrutiny review.  
 21 *See Saenz*, 526 U.S. at 501-03; *see also Dunn*, 405 U.S. at 341-42 ("The right to travel is an  
 22 'unconditional personal right,' a right whose exercise may not be conditioned"); *Soto-Lopez*,  
 23 476 U.S. at 904-06; *Smith v. D.C.*, 387 F.Supp.3d 8, 28-30 (D. D.C. 2019). The Supreme Court  
 24 has held that durational residency laws single out the class of bona fide residents who have  
 25 recently exercised their constitutionally protected right to travel, and penalize those travelers  
 26 directly. *Dunn*, 405 U.S. at 338. "Absent a compelling state interest, a State may not burden the

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1 right to travel in this way.” *Id.* at 341-42. Under strict scrutiny, the LCB must prove the  
 2 Residency Requirements are narrowly tailored to serve a compelling governmental interest. *Id.*

3       The Residency Requirements violate the Equal Protection and Privileges or Immunities  
 4 Clauses for the same reasons they violate the Privileges and Immunities Clause in Article IV and  
 5 the dormant Commerce Clause. The Justifications are not compelling governmental interests.  
 6 The lone exception may be the interest in improving public safety, but as with the other non-  
 7 compelling interests, the Residency Requirements are not narrowly tailored to accomplish that  
 8 interest. As described above, the LCB’s broad oversight powers—which tightly regulate licensed  
 9 cannabis businesses—provide less restrictive means to promote public safety without requiring  
 10 that equity holders be and remain Washington residents. Moreover, the LCB arbitrarily  
 11 distinguishes between nonresident financiers (which are permissible) and equity owners (which  
 12 are not) despite having no basis that allowing ownership poses some risk to public safety.

13       The State cited *Martinez v. Bynum*, 461 U.S. 321 (1983), to suggest the Residency  
 14 Requirements survive strict scrutiny. Dkt. #13-1 at 22. *Martinez* involved a bona fide residency  
 15 requirement, not a durational residency requirement. 461 U.S. at 333. Bona fide residency  
 16 requirements may be legitimate, but durational residency requirements are highly suspect. *Id.* at  
 17 325–29; *see also Walsh v. City & Cty. of Honolulu*, 423 F.Supp.2d 1094, 1102 (D. Haw. 2006).  
 18 The State cannot carry its burden of proving the durational Residency Requirements pass strict  
 19 scrutiny, so they should be stricken for violating the Equal Protection and Privileges or  
 20 Immunities Clauses of the Fourteenth Amendment.

21 **D. The Residency Requirements Violate Brinkmeyer’s Fourteenth Amendment Due  
 22 Process Rights.**

23       The Residency Requirements also violate the Fourteenth Amendment’s Due Process  
 24 Clause, which protects the right to pursue a profession. Unlike the Article IV Privileges and  
 25 Immunities context, the right to pursue a profession is not considered a fundamental right under  
 26 the Fourteenth Amendment Due Process Clause, and is subject to rational basis review. *Amunrud*

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1 *v. Bd. of Appeals*, 143 P.3d 571, 576 (Wash. 2006), *abrogated on other grounds by Yim v. City of*  
 2 *Seattle*, 451 P.3d 694 (Wash. 2019). Thus, the Residency Requirements survive if they are  
 3 rationally related to a legitimate state interest. *Amunrud*, 143 P.3d at 578.

4 Assuming the Justifications qualify as legitimate state interests, the Residency  
 5 Requirements are not rationally related to them. In *Gulch Gaming*, 781 F. Supp. at 631, South  
 6 Dakota asserted its residency requirement for gaming licenses was rationally related to its goals  
 7 to protect the “health, safety, morals, good order, and general welfare” of those inhabiting the  
 8 state. The court concluded those legitimate interests failed rational basis review because the state  
 9 required applicants for gaming licenses to meet various character standards, and the state would  
 10 not issue licenses unless the applicant’s background indicated that they posed no threat to the  
 11 public or the state’s ability to control gaming. *Id.* at 631-32. Given these existing standards, the  
 12 court found the additional residency requirement did not “further the goal of preventing  
 13 potentially illegal or dangerous activity from occurring within the gaming industry.” *Id.* at 632.<sup>5</sup>

14 The Residency Requirements fail for similar reasons. The LCB imposes rigorous  
 15 qualifications that applicants must satisfy before the LCB will issue a license. Striking the  
 16 Residency Requirements will not modify those qualifications. And, as the *Tennessee Wine* Court  
 17 held, applicants need not reside in Washington for the LCB to evaluate whether they meet the  
 18 qualifications to receive a license. Imposing the Residency Requirements on top of the already  
 19 robust regulatory framework that applicants must satisfy is not rationally related to the State’s  
 20 interests. Instead, it operates to unconstitutionally violate Brinkmeyer’s due process right to  
 21 pursue a profession in Washington while remaining an Idaho resident.

22 The State has claimed Brinkmeyer’s reliance on *Gulch Gaming* “falls flat” because that  
 23 case involved gambling that was federally legal. Dkt. #13-1 at 22. The State misses the point.  
 24 The residency requirement in *Gulch Gaming* failed rational basis review because, like the LCB,  
 25 the state’s existing oversight of the gambling industry accomplished the state’s legitimate

26 <sup>5</sup> Although *Gulch Gaming* was decided in the equal protection context, it applied the same rational basis test that  
 courts apply in due process challenges.

1 objectives without requiring residency. 781 F. Supp. at 631-32. Federal legality was irrelevant to  
 2 that analysis. *Id.* Moreover, the State has asserted the Justifications are rationally related to the  
 3 Residency Requirements. Dkt. #13-1 at 22. But the underlying basis for the Residency  
 4 Requirements is reducing criminality. The Residency Requirements do not prevent criminality,  
 5 *supra*, but they do unconstitutionally and irrationally prevent nonresidents from pursuing a  
 6 livelihood in Washington as owners of licensed cannabis businesses.

7 **V. CONCLUSION**

8 The Constitution has always prevented states from creating markets that only their  
 9 residents can access, but that is the express purpose of the Residency Requirements. There is no  
 10 question that if the Residency Requirements were in any other industry created by the State, they  
 11 would be unconstitutional. It is the policy of Washington not to treat cannabis use like a crime,  
 12 but the LCB relies exclusively on the federally illegal status of marijuana—a status it disregarded  
 13 when creating the market it now denigrates as an illegal threat to the public—to deprive  
 14 Brinkmeyer of his constitutional rights. Federal courts reject those self-serving arguments from  
 15 states, apply *Tennessee Wine*, and enjoin the enforcement of durational residency requirements in  
 16 cannabis. Brinkmeyer asks this Court to follow that trend. Only then can Brinkmeyer's  
 17 application be reviewed fairly and not subject to discrimination based solely on living in a state  
 18 other than Washington.

19 DATED this 1<sup>st</sup> day of February, 2022.

20 MILLER NASH, LLP

21 /s/ Andy Murphy

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**DECLARATION OF SERVICE**

I, Jennifer L. Schnarr, hereby declare under penalty of perjury under the laws of the United States and the state of Washington that on this 1<sup>st</sup> day of February, 2022, a copy of the foregoing document was served upon the attorneys of record in the above cause as follows:

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